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No. 89-62

In the Supreme Court of the United States

OCTOBER TERM, 1989

FREDERICK JOSEPH TURK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed petitioner's conviction after the district court denied petitioner's motion for a mistrial based on the government's eliciting testimony that petitioner had previously been imprisoned on unrelated charges.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Furman v. *United States*, 720 F.2d 263 (2d Cir. 1983)	9
NLRB v. *Amalgamated Clothing Workers, Local 990*, 430 F.2d 966 (5th Cir. 1970)	10
Odom v. *United States*, 377 F.2d 853 (5th Cir. 1967), cert. granted, 399 U.S. 904, cert. dismissed, 400 U.S. 23 (1970)	8-9
Richardson v. *Marsh*, 481 U.S. 200 (1987)	7
Taylor v. *McKeithen*, 407 U.S. 191 (1972)	9
United States v. *Andrea*, 538 F.2d 1255 (6th Cir. 1976)	8
United States v. *Baynes*, 548 F.2d 481 (3d Cir. 1977)	10
United States v. *Christian*, 427 F.2d 1299 (8th Cir.), cert. denied, 400 U.S. 909 (1970)	8
United States v. *Dillinger*, 341 F.2d 696 (4th Cir. 1965)	8
United States v. *Montemayor*, 684 F.2d 1118 (5th Cir. 1982)	8
United States v. *Nixon*, 779 F.2d 126 (2d Cir. 1985)	8
United States v. *Pavon*, 561 F.2d 799 (9th Cir. 1977)	8
United States v. *Plante*, 472 F.2d 829 (1st Cir.), cert. denied, 411 U.S. 950 (1973)	8

Cases—Continued: Page

United States v. *Ratner*, 464 F.2d 169 (5th Cir. 1972) 8
United States v. *Warf*, 529 F.2d 1170 (5th Cir. 1976) 8

Statutes and rules:

21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
28 U.S.C. 1291 9
Fed. R. App. P. 36 9
Fed. R. Evid. 404(b) 7

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unpublished, but the judgment is noted at 873 F.2d 298 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1989. A petition for rehearing was denied on May 4, 1989 (Pet. App. A2). The petition for a writ of certiorari was filed on July 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to possess five kilograms or more of cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and one count of possession of 500 grams or more of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 12 years' imprisonment. The court of appeals affirmed.

1. The evidence at trial, which is summarized in the government's brief in the court of appeals, showed that in October 1985 federal authorities arrested Check Sheem Fong on narcotics charges in New York City. As a result, Fong agreed to serve as a confidential informant for the Drug Enforcement Administration. While working with the DEA in early February 1987, Fong telephoned petitioner, who was living in southern Florida. Fong complained of having financial problems and asked petitioner whether he had "some quick connections." Petitioner responded "yeah man," and Fong then told petitioner that he would be visiting in Florida some time during the next two months. Gov't C.A. Br. 4.

Fong travelled to Florida at the end of April 1987. While in Jacksonville, Fong telephoned petitioner in Miami. Petitioner told Fong that he would be working in Bartow, Florida, repairing boats. Petitioner gave Fong the telephone number in Bartow where he could be reached. Gov't C.A. Br. 4-5.

On April 26 Fong drove to Bartow and met with petitioner. Fong told petitioner that he wanted to acquire ten kilograms of cocaine. Several weeks later, on May 17, petitioner spoke with Fong over the tele-

phone. Petitioner referred to cocaine as "oranges" and told Fong that the price for the "oranges" was "21-23" for each "box," that is, $21,000 to $23,000 for each kilogram of cocaine. Petitioner also discouraged Fong from making direct contact with a certain drug trafficker in Miami. Petitioner told Fong that he wanted to close the cocaine deal in Bartow and that his "connection" there was better than the Miami dealer. Gov't C.A. Br. 5.

On May 19, after Fong had returned to New York, petitioner, using an alias, called Fong collect from a pay phone in Florida. Fong explained that he wanted ten kilograms of cocaine delivered to New York City. Petitioner agreed personally to make the necessary arrangements in Bartow and told Fong that the price was "22-23" per kilogram. Petitioner remarked that it had taken him a week to "set it up," and he forbade Fong from contacting the Miami dealer directly. Gov't C.A. Br. 6.

On June 1, Fong, accompanied by two DEA agents, returned to Florida. He met petitioner that day in Bartow and reported that he was ready to close the cocaine deal. After making a telephone call, petitioner drove Fong to a service station. Petitioner left Fong at the station and drove to the residence of John Cook—petitioner's drug source. When he returned to the service station, petitioner told Fong that he would have all of the last-minute details regarding the cocaine deal later that night. At 9 o'clock that evening petitioner told Fong that the deal could proceed. Gov't C.A. Br. 6-7.

Fong was forced to seek to delay the deal several days, because the DEA agent assigned the role of financier was summoned back to New York unexpectedly. On the evening of June 3 petitioner and

Fong again drove to the service station. Fong left petitioner behind and then drove to Cook's residence, where he picked up one kilogram of cocaine. Petitioner returned to the service station and told Fong that, as a result of the delay, his source had only one kilogram of cocaine available and that the deal would have to be done in installments. Gov't C.A. Br. 7-8.

Fong contacted petitioner the following morning and told petitioner that he had enough money on hand to buy ten kilograms of cocaine. At a meeting later that day, petitioner told Fong that all but one kilogram had been returned to Miami. Petitioner directed Fong to pick up the remaining nine kilograms in Miami, but he explained to Fong that he would have to pay for the total purchase in advance. Petitioner and Fong later drove to a shopping mall to close the deal. DEA agents arrested petitioner at the shopping mall; they found the kilogram of cocaine stashed under the hood of petitioner's car. Gov't C.A. Br. 9-10.

2. Before trial, petitioner filed a motion in limine to preclude the government from referring to or eliciting testimony regarding the fact that petitioner and Fong had served prison sentences together in the late 1970s. The district court instructed the government "in its opening statement not to mention the fact that these two were incarcerated, if they were, or that the evidence—they intend to produce [it]." Pet. App. A4. The court, however, reserved ruling on the relevance and admissibility of any such evidence pending developments at trial. *Id.* at A5-A6.

As the government's first witness, Fong testified that he had been convicted on narcotics charges in 1976 and had served a prison sentence at Eglin Air Force Base, in Florida. Fong stated that he met petitioner in 1977 and that he later visited petitioner in

1983. The prosecutor then asked Fong to describe what he and petitioner had discussed during their 1983 visit; Fong replied that "we talked about alot [*sic*] of old things and the old buddies from Eglin Air Force Base." Gov't C.A. Br. 14. Defense counsel objected, but the district court overruled the objection.

Fong then testified that, at this meeting, he asked whether petitioner knew a cocaine source. Fong explained that he posed the question because petitioner had "mentioned that some old buddy come to see him to do some business with him, you know, so that's why I am asking him if I want the same thing can he do it for me." Gov't C.A. Br. 14. Defense counsel again objected, but the district court overruled the objection.

Thereafter, the prosecutor called to the stand James Cloonan, one of the two DEA agents who had accompanied Fong to Florida, and asked him about Fong's references to petitioner before February 1987. Cloonan testified that Fong had known petitioner from the time they were in prison together. The district court sustained defense counsel's objection, and promptly instructed the jury to disregard both the prosecutor's question and the witness's testimony. Gov't C.A. Br. 15.

As a result of both Fong's and Cloonan's testimony, defense counsel later moved for a mistrial, claiming that the government had violated the court's in limine order by deliberately eliciting testimony regarding petitioner's previous conviction and sentence.

The district court denied the motion. Pet. App. A6-A23. With respect to Fong's testimony, the court concluded that the prosecutor "hasn't violated [the in limine ruling] at all" because Fong had not testified that he met petitioner while in prison at Eglin

Air Force Base. *Id.* at A7; see also *id.* at A8-A11. Turning to Cloonan's testimony, the court explained that its prompt curative instruction was sufficient and that it intended to repeat the instructions that "the defendant is not on trial for any act or conduct not charged in the indictment, that he has the presumption of innocence and [other standard instructions before the close of the trial]." *Id.* at A20-21.[1]

The district court later instructed the jury that petitioner was on trial only for the offenses charged in the indictment, that the jury had to determine whether the government proved petitioner's guilt beyond a reasonable doubt based only on the evidence admitted at trial, and that the jury was not to consider any matters that it had been ordered to disregard after an objection had been sustained.

3. On appeal, petitioner contended that the district court erred in denying his motion for a mistrial and that the government had presented insufficient evidence on the conspiracy count. The court of appeals affirmed without opinion. Pet. App. A1.[2]

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[1] The court also invited defense counsel to "supply * * * some kind of instruction that you want me to give," Pet. App. A20, but defense counsel conceded that he could not "perceive any instruction that wouldn't exacerbate the problem." *Id.* at A21. Defense counsel suggested that "[t]here is no curative instruction [that] I can ask for." *Ibid.* The court then reminded him that it has "struck the testimony and * * * told the jury to disregard it. That is curative." *Ibid.*

[2] Petitioner has not sought further review of his challenge to the sufficiency of the evidence.

ARGUMENT

1. Petitioner principally contends (Pet. 11-30) that the district court should have granted his motion for a mistrial based on the testimony at trial that revealed that petitioner had previously been imprisoned on unrelated charges. Petitioner claims that the district court's curative instructions could not mitigate the prejudice that flowed from that testimony, and thus the court of appeals improperly treated the admission of that testimony as harmless error.[3]

The isolated and passing reference to petitioner's previous imprisonment, even in the context of petitioner's failed entrapment defense, did not constitute reversible error. As petitioner himself concedes (Pet. 19), the government presented substantial uncontroverted evidence of petitioner's complicity in the cocaine transaction. Moreover, the district court promptly gave curative instructions that directed the jury to disregard the testimony in question and reiterated that a criminal defendant is presumed innocent and that the jury's decision must be based only on the evidence admitted at trial. Petitioner did not request any additional curative measures at trial.

Petitioner offers no reason for this Court to depart from "the almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). Following that established principle, courts of appeals have uniformly held that prompt curative instructions adequately neutralize an isolated reference to an unrelated con-

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[3] Petitioner's discussion of the admissibility of his previous conviction under Fed. R. Evid. 404(b) is beside the point. See, *e.g.*, Pet. 11-14. The district court did not permit the government to introduce any such evidence.

viction particularly where, as here, the evidence of guilt is very strong. See, *e.g.*, *United States* v. *Nixon*, 779 F.2d 126, 132-133 (2d Cir. 1985); *United States* v. *Montemayor*, 684 F.2d 1118, 1122 (5th Cir. 1982); *United States* v. *Pavon*, 561 F.2d 799, 802-803 (9th Cir. 1977); *United States* v. *Andrea*, 538 F.2d 1255, 1257 (6th Cir. 1976); *United States* v. *Plante*, 472 F.2d 829, 830-831 (1st Cir.), cert. denied, 411 U.S. 950 (1973); *United States* v. *Christian*, 427 F.2d 1299, 1301-1304 (8th Cir.), cert. denied, 400 U.S. 909 (1970); *United States* v. *Dillinger*, 341 F.2d 696 (4th Cir. 1965).

The cases petitioner cites as having "reversed convictions based on the erroneous admission of virtually identical evidence" (Pet. 14) are in fact readily distinguishable.[4] In *United States* v. *Warf*, 529 F.2d 1170 (5th Cir. 1976), for example, the court of appeals reversed the conviction not merely because testimony was elicited about the defendant's previous unrelated prison sentence, but also because the prosecutor "followed it up with the inquiry 'How long were you in Federal Prison with him?'" and improperly "assisted [the witness] both verbally and by pointing" to identify the defendant in the courtroom. 529 F.2d at 1174. Similarly, in *United States* v. *Ratner*, 464 F.2d 169, 171-173 (5th Cir. 1972), the court of appeals reversed the conviction where the prosecutor twice highlighted testimony regarding the defendant's previous unrelated incarceration, even after the district court had issued curative instructions. And in *Odom* v. *United States*, 377 F.2d 853,

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[4] Petitioner mistakenly relies on *United States* v. *Pavon*, 561 F.2d 799, 802-803 (9th Cir. 1977). In that case, the court of appeals affirmed the conviction after determining that the admission of extraneous testimony was harmless error.

859-860 (5th Cir. 1967), cert. granted, 399 U.S. 904, cert. dismissed as improvidently granted, 400 U.S. 23 (1970), the evidence of the defendant's guilt was not overwhelming, and thus the court of appeals was not persuaded that the unrelated testimony was harmless error.[5]

2. To the extent that petitioner criticizes the court of appeals for affirming his conviction without an opinion (*e.g.*, Pet. 11, 15, 19, 27-30), that claim supplies no basis for reviewing, much less reversing, the judgment below. The right to appeal provided a defendant under 28 U.S.C. 1291 entitles him to an independent review of the district court's judgment by the court of appeals. Petitioner received precisely that. The right to an appeal does not also encompass the right to an opinion treating each of the defendant's claims separately and in detail. "The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983). See also *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (courts of appeals "have wide latitude in

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[5] Petitioner suggests (Pet. 23-26) that the court of appeals improperly ignored the possibility of prosecutorial misconduct, namely, that the government flouted the district court's in limine order and deliberately elicited testimony concerning petitioner's previous conviction and sentence. First, the record does not support that allegation. See, *e.g.*, Pet. App. A22 (district court dismisses petitioner's charge of prosecutorial misconduct). Second, even if such a charge were substantiated, the record plainly shows that the improper testimony, in light of the district court's prompt curative instructions, amounted to harmless error even if the error was the product of intentional disregard of the court's order.

their decisions of whether or how to write opinions"); *United States* v. *Baynes*, 548 F.2d 481 (3d Cir. 1977); *NLRB* v. *Amalgamated Clothing Workers; Local 990*, 430 F.2d 966, 971 (5th Cir. 1970)); Fed. R. App. P. 36 (recognizing practice). Requiring the courts of appeals to publish an opinion in every case would impose a significant and needless burden on the courts and the profession, especially because (as petitioner's appeal illustrates) many appeals have little merit, involve nothing more than the application of settled law to the facts, or follow an opinion by the district court fully addressing the issues raised on appeal. Although the harmless error doctrine, as petitioner points out, requires a reviewing court to examine the record, that doctrine does not require the reviewing court to detail its conclusions in a written opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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